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Tax Avoidance & the return of CC(C)TB
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Change of paradigms: old-new CCCTB

- The old CCCTB proposal [Proposal for a Council Directive on a CCCTB, COM(2011) 121 final, CNS 2011/0058] dates from 16 March 2011 and was the final phase of work that started with the creation of the CCCTB Working Group in November 2004 with its last session in April 2008.
- These were the heydays of globalisation, before financial crisis and tax scandals

Change of paradigm: old-new CCCTB

- The period of 2011-2012 was the peak of the euro-crisis, which was not the opportune moment for the Commission to submit the CCCTB proposal to the Council.
- The Commission was busy shoring up the €, enforcing budgetary discipline with the MS and concentrating on new rules for cross-border EOI in reaction to worldwide tax scandals and the introduction of FATCA legislation in the US.

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Change of paradigm: old-new CCCTB

- Directive 2010/24/EU of 16.03.2010 on cross-border recovery of tax claims
- Directive 2011/16/EU of 15.02.2011 on cross-border administrative cooperation
- Directive 2014/48/EU of 24.03.2014 on savings income of interest payments repealed on 10.11.2015
- Directive 2014/107/EU of 09.12.2014 incorporating FATCA into EU Law

Change of paradigm: old-new CCCTB

- **Shift in political priorities** in international taxation started with the Leader's statement of the G 20 Londen summit on 02.04.2009 no. 15 :"The era of banking secrecy is over" & FATCA approved on 18.03.2010 in US.
- It got a decisive boost by the Commission Recommendation on Agressive Tax Planning (2012/772/EU) of 06.12.2012 and the BEPS report and action plan launched by the OECD in 02.2013.

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Change of paradigm: old-new CCCTB

Shift in paradigms

- Shift from avoidance of double taxation to **double non-taxation.**
- New standard of systematic and **automatic EOI on the basis of the FATCA model**
- **Emphasis on GAAR** in tax treaties
- Realigning the value chain: **connecting taxable profits to place of "real" economic activities.**

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Change of paradigm: old-new CCCTB

- The quick approval of a succession of Directives increasing powers of the tax administrations of the MS on EOI inspired the new Commission to **integrate anti-avoidance measures into the common tax base**, to make it palatable to the MS.

Presentation old CCCTB

Fight against tax avoidance is not a major objective of CCCTB:

- “The CCCTB aims to tackle some major fiscal impediments to growth in the Single Market. In the absence of a common corporate tax rules, the interaction of of national tax systems often leads to **over-taxation and double taxation**, businesses are facing heavy administrative burdens and high compliance costs.”

Presentation old CCCTB

Fight against tax avoidance is not a major objective of CCCTB:

- The system should include a general anti-abuse rule supplemented by specific measures such as limitation of **interest deduction** to associated enterprises in **third countries** which do not exchange information. (preamble no. 20)

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Presentation new CCCTB

Fight against tax avoidance is one of the two major objectives of CCCTB:

- “Alongside the **anti-tax avoidance function** of the CCCTB, the re-launched project would also retain its features as a corporate tax system which facilitates cross-border trade and investment in the internal market” (expl. mem. p.2)

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Presentation new CCCTB

Fight against tax avoidance is one of the two major objectives of CCCTB:

- “Furthermore, the re-launched proposal for a CCCTB would include rules to address some of the key Actions of the OECD initiative on Base Erosion and Profit Shifting (**BEPS**)”. (expl. mem. p. 4)

Presentation old CCCTB

Art. 80

- “Artificial transactions carried out for the **sole** purpose of avoiding taxation shall be ignored for the purposes of calculating the tax base”.
- This reflects ECJ case law in C-255/02 Halifax and C-196/04 Cadbury Schweppes:

  “wholly artificial arrangement”

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Presentation old CCCTB

Art. 80

- “The 1st. Paragraph shall not apply to genuine commercial activities where the taxpayer is able to choose between two or more possible transactions which have the same commercial result but which produce different taxable amounts”.

Presentation new CCCTB

Art. 58

- For the purposes of caculating the tax base under the rules of this Directive, a MS shall disregard a .. series of arrangements which, having been put in place for the **essential purpose** of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine, having regard to all relevant facts and circumstances

Presentation new CCCTB

Art. 58

- For the purposes of par. 1, a .. series of arrangements shall be regarded as non-genuine **to the extent** that they are not put in place for valid commercial reasons that reflect economic reality.
- Arrangements that are disregarded in accordance with par. 1 shall be treated .. by reference to their **economic substance**.

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Comparison old & new CCCTB

Old CCCTB	New CCCTB
artificial transactions	arrangements which are **not genuine** by all relevant facts and circumstances
sole purpose: tax avoidance	**essential purpose: tax advantage** that **defeats object or purpose of directive**

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Comparison old & new CCCTB

Old CCCTB

Exclusion:

genuine commercial activities with **choice** between same commercial result but different tax result

New CCCTB

No positive exclusion, but arrangement is only non-genuine **to the extent** that it is not put in place for valid commercial reasons

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Comparison old & new CCCTB

Old CCCTB	New CCCTB
How to tax?	How to tax?
No rule: national anti-avoidance rule?	Calculation of tax base by reference to economic substance

Comparison old & new CCCTB

Old CCCTB New CCCTB

In their wording both proposals do not make any difference between purely internal and cross-border situations in which the fundamental freedoms of the TFEU apply, while national anti-avoidance concepts are > than EU anti-avoidance justification accepted by ECJ.

Comparison ATAD & CCCTB

ATAD	CCCTB
main purpose or **one of the main purposes** of	**essential purpose**
obtaining a tax advantage that defeats the object or purpose of	
the applicable (national) tax law	this Directive

Comparison ATAD & CCCTB

ATAD CCCTB

Exclusion? Both directives are identical. There is no positive exclusion, but arrangements are only non-genuine **to the extent** that they are not put in place for valid commercial reasons that reflect economic reality.

Comparison ATAD & CCCTB

ATAD	CCCTB
How to tax?	How to tax?
reference to	reference to
national law	economic substance

What if national law violates fundamental freedoms in cross-border cases?

Is there an EU concept of economic substance?

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Comparison CCCTB & VAT

Tax avoidance in VAT

- C-419/14, WebMind Licenses Kft.,17.12. 2015: Halifax and Cadbury Schweppes
- Par. 36: ".. the essential aim of the transactions concerned is solely to obtain that tax advantage".
- Par. 44: ".. it is necessary to establish that [the] agreement constituted a wholly artificial arrangement.."

Critical analysis new CCCTB

Essential <-> Cadbury Schweppes

- Essential means that there may be other commercial, non-tax objectives, but that tax avoidance is clearly dominant, i.e. essential implies a comparison between the tax objectives and other objectives.

Critical analysis new CCCTB

Essential <-> Cadbury Schweppes

- C.S. no. 35: “The fact that a company was established in a MS for the (avowed) purpose of benefiting from a more favourable (tax) legislation does not in itself constitute abuse of freedom”.

Critical analysis new CCCTB

Essential <-> Cadbury Schweppes

- No. 55: “In order for a restriction on the freedom of establishment to be justified on the grounds of abusive practices (tax avoidance), the specific objective of such restriction must be to prevent conduct involving the creation of **wholly artificial arrangements** which do not reflect economic reality”

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Critical analysis new CCCTB

Essential <-> Cadbury Schweppes

- No. 64-67: “In order to find such an arrangement there must be … objective circumstances showing that despite the formal observance of the conditions laid down in Community law, the objective pursued by the freedom of establishment … has not been achieved”.

Critical analysis new CCCTB

Essential <-> Cadbury Schweppes

- No. 64-67: “ … in order for the CFC law to comply with EU law the taxation provided mist be excluded, where **despite the tax motives the incorporation reflects economic reality**”. The ECJ requires physical presence in terms, staff and equipment. **No comparison between tax benefit and taxable profit!**

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Critical analysis new CCCTB

“To the extent” <-> Cadbury Schweppes

- Art. 58.2: “… an arrangement … shall be regarded as non-genuine **to the extent that they are not put in place for valid commercial reasons that reflect economic reality**”.
- 1st. Question: Is the exercise of the fundamental freedoms a valid commercial reason? Presumably yes!

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Critical analysis new CCCTB

“To the extent” <-> Cadbury Schweppes

- 2nd. Question: With what is the effective exercise of a fundamental freedom to be compared to make it a commercial reason that **not only partially but fully** reflects economic reality. Presumably not the relative comparison between the tax benefit and the amount of taxable profit.

Critical analysis new CCCTB

“To the extent” <-> Cadbury Schweppes

- Suggested solution: Recommendation of 06.12.2012 on agressive tax planning C(2012)8806 final: 4.2: “An artificial arrangement … which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored”

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Critical analysis new CCCTB

“To the extent” <-> Cadbury Schweppes

- Suggested solution: 4.6: “For the purposes of point 4.2, a given purpose is to be considered essential where any other purpose of the taxpayer that is or could be attributed to the arrangement **appears at most negligible,** in view of all the circumstances of the case”.
- **Marginale toetsing!**

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Critical analysis new CCCTB

No distinction internal/cross-border

- CCCTB directive applies to internal and cross-border situations, but the GAAR does not make any distinction.
- Cadbury S. clearly established that the effective exercise of the fundamental freedoms excludes tax avoidance. But **that rule does not apply internally.**

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Critical analysis new CCCTB

Object and purpose of the directive

- Directive has two objectives: (1) anti-tax avoidance function, (2) establish a corporate tax systems which facilitates cross-border trade and investment.
- Does objective (2) include benefiting from a more favourable tax regime, or is that excluded by objective (1)?

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Critical analysis new CCCTB

Difference ATAD – CCCTB

- Tax advantage is main purpose or one of the main purposes <-> essential purpose,

  Essential purpose = at least dominant purpose.
- Defeating national tax law <-> defeating directive. Purpose of directive = facilitating cross-border trade & investment.

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Critical analysis new CCCTB

Difference ATAD – CCCTB

- CCCTB-GAAR is **absolute rule**, ATAD-GAAR is **minimum level of protection**, allowing for higher level of protection of domestic tax base.
- By making CCCTB optional < 750 mill. € in revenue, other companies can choose their applicable GAAR regime.

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Critical analysis new CCCTB

Tax where value is actually created

- Goal of directive: connecting taxable profits to place of real economic activity.
- That connection presupposes some (proportional or systematic?) relationship between profits and economic activity.

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Critical analysis new CCCTB

Tax where value is actually created

- Such relationship can only be objectively achieved by formula apportionment: **assets, sales, employees are proxies for real economic activity**.
- Profits have no systematic relationship to real economic activity, because such real activity can also realise losses.

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Critical analysis new CCCTB

Tax where value is actually created

- The only judgement to be made on real economic activity is a marginal judgement
- Any real economic activity that exceeds a minimal effective activity may be very profitable or loss making. Any form of systematic relationship between profits and activity is illusory.

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Suggestions as conclusions

Agreement on anti-avoidance

- There is general moral & legal agreement that **where a taxpayer has the choice** of several courses of action that yield a more or less comparable (economic) result with (quite) differen tax results, the **taxpayer is entitled to choose** the course leading to the lowest tax liability.

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Suggestions as conclusions

The real questions

- The real question is whether the taxpayer is entitled to exploit (1) defects in the drafting of national legislation or (2) cross-border disparities between national tax systems, when several more or less comparable courses of action would allow such exploitation.

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Suggestions as conclusions

Who is responsible to close the loopholes?

- The answer to that question depends on who has the responsibility for the correct application of the tax law: the taxpayer or the government (tax administration). It is clear that the **taxpayer has no legal responsibility to close loopholes of international disparities**.

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Suggestions as Conclusions

No taxpayer cross-border responsibility

- With respect to the cross-border disparities in national legislation of MS, the ECJ has held that the taxpayer is entitled to exploit these disparities. His only legal obligation is the effective exercise of his fundamental economic freedoms, without any link to taxable profits.

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Critical analysis new CCCTB

Responsibility in national tax law

- With respect to national tax laws, there are **many different views** in MS, but generally “economic substance” or the “spirit of the law” prevails only when the exploitation of the tax benefit is clearly or manifestly unreasonable, i.e. when the link with reality falls below a minimum.

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Critical analysis new CCCTB

Suggestion for anti-avoidance

- This suggests (1) to **reject** any EU GAAR that applies when **tax objectives are more or less comparable** to non-tax objectives and (2) to make a **distinction between internal and cross-border** situations in the EU, which puts a special burden on a GAAR-CCCTB, covering both situations.

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Critical analysis new CCCTB

Connecting profit to economic reality

- The only objective way to connect taxable profits to real economic activity in a particular tax jurisdiction is **formula apportionment**, because profits do not have a systematic relationship to real activities. If profits are used a minimal level of effective activity suffices.

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Critical analysis new CCCTB

Connecting profit to national jurisidction

- If taxable profits are used a minimal level of effective activity suffices to connect with a national tax jurisdiction.
- This results into double juridical taxation which is to be avoided by a **combination** of **market mechanisms** in transfer pricing & **income splitting** between jurisdictions.

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